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The View Condominium Owners Association v. MSICO, L.L.C. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE VIEW CONDOMINIUM OWNERS ASSOCIATION, a Utah condominium association, Plaintiff/Appellant, vs. MSICO, L.L.C., a Utah limited liability company; THE TOWN OF ALTA, a political subdivision of the State of Utah; and JOHN DOES 1 through 10, Defendants/Appellees.	)	No. 20020746 CA

REPLY BRIEF OF APPELLANT

On Appeal From the Third Judicial District Court, Salt Lake County
Case No. 000910067PD, Honorable Michael K. Burton

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ORAL ARGUMENT REQUESTED

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I. MSI AND ALTA RAISE NEW ARGUMENTS FOR THE FIRST TIME IN THIS APPEAL, EACH OF WHICH SHOULD BE REJECTED.

At the outset, this Court should note that MSI and Alta raise three brand new arguments in their appeal brief and ask this Court to take judicial notice of documents outside the record. They characterize these as issues of "standing." First, they argue The View was involuntarily dissolved as a corporation. (Aplees. Br. at 14-15; Aplees. Addend. Ex. 2.) Second, they argue The View is not successor in title to The View Associates, Ltd. (Aplees. Br. at 15-16.) Third, they suggest The View has sued the wrong defendants. (Aplees. Br. at 26-28.)

This Court generally does not consider arguments raised for the first time on appeal. *See State v. Brown*, 856 P.2d 358, 359-60 (Utah App. 1993). Nor does this Court consider evidence not presented below. *See id.* Nor does this Court opine on arguments not presented or reached in the district court. *See id.* MSI/Alta's offerings violate each of these basic tenets of appellate practice in this Court.

Judicial notice is not properly invoked here either. In the case cited by MSI/Alta on pages 15 and 27 of its brief, the Sixth Circuit looked specifically to prior case law establishing the propriety of judicially noticing administrative decisions. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen, & Helpers v. Zantop Air Transp. Corp.*, 394 F.2d 36, 40 (6th Cir. 1968). No similar showing is made here.

As MSI and Alta note, this Court may render its decision based on "any legal ground or theory *apparent on the record.*" *Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29

P.3d 1225, 1230 (emphasis added). MSI and Alta, however, have stepped *outside the record* and should not be rewarded for using such tactics. The View should have the opportunity to meet evidence under the rubric provided by the Utah Rules of Civil Procedure with its attendant discovery procedures. Presumably, MSI and Alta would have been required to designate documents under Utah R. Civ. P. 26(a) and otherwise allow The View the opportunity for appropriate discovery and development of argument in the district court. MSI/Alta concede this was not done. (Aplees. Br. at 26.)

In an effort to minimize the newness of their arguments, MSI/Alta, without citing any authority, couch each of the new arguments they now raise as issues of "standing." However, contentions regarding capacity to sue, chain of title, and ownership of property are not "standing" questions. They are factual issues which have not been developed or adjudicated in the trial court and are not part of the record. Standing concerns itself with whether the proper party is before the Court adjudicating claims. *See, e.g.*, *Sierra Club v. Department of Env'l Quality*, 857 P.2d 982, 984-87 (Utah App. 1993).[1]

MSI and Alta also contend these issues call into question the courts' "subject matter jurisdiction." (Aplees. Br. at 14.) The issue of a party's standing to bring claims is one of justiciability, not judicial power. This Court indisputably has subject matter jurisdiction over this appeal, a conclusion MSI and Alta effectively agreed with when they adopted The View's opening jurisdictional statement. (*See* Aplees. Br. at 1; Aplt.

[1] As the *Sierra Club* case shows, "standing" has been raised for the first time on appeal in cases of private parties seeking to enforce public rights. Even if the issues here were properly characterized as related to "standing," they involve enforcement of private rights. MSI/Alta cite no case holding that such questions can or should be raised for the first time on appeal.

Br. at 1.) As shown more fully below, MSI/Alta's contentions are each factual or legal arguments that could have been made below but are now waived. The View will address each contention more particularly in turn.

The View Condominium Association's Corporate Status. MSI/Alta argue that The View lacks the legal capacity to sue because it was involuntarily dissolved in 1988. Utah R. Civ. P. 9(a) expressly provides:

> When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued . . . he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge, and on such issue the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(Emphasis added.) Here, MSI/Alta never argued below that The View lacked capacity to sue and never challenged below The View's "legal existence," let alone by specific negative averment with supporting particulars.

The Utah Supreme Court has held repeatedly that Rule 9(a) prohibits a party from challenging a party's legal existence or capacity at any late stage of the proceedings. In *Phillips v. JCM Development Corp.*, 666 P.2d 876 (Utah 1983), the court held that the defendant's failure to raise below "a specific negative averment of plaintiff's lack of capacity to sue" resulted in a waiver of defendant's right to raise the issue. *Id.* at 884. The court refused to consider the issue for the first time on appeal.

The court went further in *Hal Taylor Associates v. Union America, Inc.*, 657 P.2d 743 (Utah 1982), where it held that defendant's failure to challenge plaintiff's capacity to sue until the last day of trial resulted in a waiver of the defense. The court noted that

"notice and the resulting opportunity to respond are the critical factors in requiring compliance with Rule 9(a)(1)." *Id.* at 748. That notice, moreover, "must be definite and clear." *Id.* Here, MSI/Alta gave The View no notice that they "desire[d] to raise an issue as to the legal existence" of The View. The failure to raise the issue until their brief on appeal is, as a matter of law, a waiver of that argument.

Even if MSI/Alta had not waived any such challenge, their argument is meritless. "Dissolution of a corporation does not . . . prevent commencement of a proceeding by or against the corporation in its corporate name." Utah Code Ann. § 16-10a-1405 (enacted 1992). That code provision, which was in effect at the time this suit was filed in 2000, governs The View's capacity to sue. *See, e.g.*, *Wilde v. Wilde*, 969 P.2d 438, 442 (Utah App. 1998) (court applies law in effect at time action initiated). Because Utah law plainly provides that The View was not barred from commencing a lawsuit, MSI/Alta's challenge to The View's capacity fails.

Ultimately, The View can bring suit as a condominium management committee regardless of its corporate status. The Declaration which The View seeks to enforce specifically provides that "any Maintenance Association . . . shall have the right to enforce compliance with the Project Documents in any manner provided by law or in equity." (Aplt. Addend. Ex. 2, p. 29, § 7.1; R. 391.) A "Maintenance Association" is defined in the Declaration as "any incorporated *or unincorporated association of Lot or Unit Owners* . . . which is formed by operation of law *or by the execution and filing of certain documents* to facilitate the management, maintenance and/or operation of any portion of the Project . . . ." (Aplt. Addend. Ex. 2, p. 4, § 1.18; R. 366, emphasis added.)

The View meets this definition and may enforce the Restrictive Covenants under their express terms.

The Declaration of The View Condominium Project submitted in part by MSI/Alta specifically subjects The View to the provisions of the Utah Condominium Ownership Act, Utah Code Ann. § 57-8-1 *et seq.*, as amended. (Ex. A hereto, p. 3, ¶ D.) Under this act, an "'association of unit owners' means all of the unit owners acting as a group in accordance with the declaration and by-laws." Utah Code Ann. § 57-8-3. Under The View's declaration, "[e]ach owner shall be entitled and required to be a member of the Association." (Ex. A, p. 14, § 7.01.) Thus, the Association is no more and no less than a group comprising each owner of the individual condominium units of The View Condominiums. MSI/Alta agreed in the district court that The View "is an association of owners of units in the Sugarplum Planned Unit Development." (R. 339.) These owners, individually and collectively, clearly have "standing" to assert these claims.

Even if corporate status were properly raised and considered here, and even if it played a proper role in the analysis, the Supreme Court in *Mackay & Knobel Enters., Inc. v. Teton Van Gas, Inc.*, 460 P.2d 828, 829 (Utah 1969), the case relied on by MSI/Alta, held that the primary purpose of state administrative action vis-à-vis a fictional corporate entity is to induce the corporation to pay its fees to the state. *See id.* at 830. As such, the Supreme Court reversed a lower court decision dismissing the case under the statute and remanded for a determination on the merits. *See id.* Here, as in *Mackay & Knobel*, the "relationship between the corporation and the State" is the real purpose behind the

statute, and, as a result, the Court "should not confer an advantage upon a [party] who may have wrongfully damaged the corporation." *Id.* at 830.

In sum, MSI/Alta's corporate capacity argument should be rejected on all fronts.

The View as Successor in Title. Next, MSI and Alta question whether The View is properly considered the "successor in title" to The View Associates, Ltd., which was the original purchaser of Lot 8. This is not correctly characterized as a question of standing. Rather, this is an issue of fact that was raised but not disputed below, passed on by the district court favorably to The View, and not appealed by MSI or Alta. Only MSI/Alta's argument on appeal is new.

The district court's order (the form of which was prepared by MSI/Alta) concluded unequivocally that The View Associates, Ltd. was The View's "predecessor in interest." (Aplt. Addend. Ex. 1, at 3; R. 590.) This was taken as an "undisputed fact." (Aplt. Addend. Ex. 1, at 2; R. 589.) Neither MSI nor Alta has cross-appealed from or previously questioned that determination.

Indeed, evidence in the record shows MSI and Alta at all times affirmatively alleged this point and treated The View as the proper entity affected by their actions. In their Motion for Summary Judgment below, MSI and Alta stated as an undisputed material fact that "Plaintiff [The View] is a successor in title from The View Associates, Ltd. via a deed recorded on, or about, January 4, 1985 . . . from Sorenson Resources Company ('SRC')." (R. 340, emphasis added.) MSI and Alta consistently acknowledged The View Associates, Ltd. as "plaintiff's predecessor in title" and "plaintiff's predecessor in interest." (R. 342.) In correspondence to The View, Alta recognized the property

rights at issue as belonging to "The View Condominium Owner's Association." (R. 541.) Moreover, the Definitive Agreement between MSI and Alta anticipated legal action by The View owners. (R. 444.) Thus, not only was this issue decided below, the record evidence and the factual concessions of MSI/Alta support the district court's decision.

Other Parking Dedications. On pages 26 and 27 of their Brief, MSI and Alta advance a new argument about The View Associates, Ltd.'s deed designating "Parcel 3" for parking and how that would be plotted today as part of "New Lot 6." The purported evidentiary support for this argument is an exhibit submitted for the first time in this appeal as an attachment to MSI/Alta's response brief. (Aplees. Br., Addend. Ex. 3.) Moreover, in their footnote 8 on page 26, MSI and Alta try to cite the Court to deeds outside the record to support this argument, without even so much as attaching the deeds. (Aplees. Br. at 26 n.8.) These items played no part in the district court's decision and cannot properly form the basis for review of that decision. MSI and Alta are openly challenging this Court's clear appellate maxims in their attempt.

The argument avails nothing in any event. Lacking is any substantive case law authority to lend support. Moreover, the argument lacks the force of logic. MSI/Alta have not shown that the designation of any other area for parking eviscerates the clear designation of Lot 5 for that purpose. The analysis they advance would render the language of the Restrictive Covenants meaningless and would deprive an anticipated party plaintiff of a remedy.

In sum, the new arguments avail MSI/Alta nothing even if considered on their merits. The Court should make clear in its ruling on this case that attempts to add new

substantive arguments on appeal are improper and a waste of judicial and litigant resources and should award The View its appeal costs for having to respond.

II. MSI/ALTA'S ARGUMENTS REGARDING LOT 5 IGNORE THE VIEW'S KEY POINTS IN THIS APPEAL.

A. Summary Judgment For MSI/Alta Cannot Be Sustained on this Record.

Turning to the merits of this case, MSI and Alta fail to address the principal points made in The View's appeal. The View has clearly shown that (1) the plain language of the Restrictive Covenants applies by its terms to the Amended Plat; (2) the Restrictive Covenants are real covenants that run with the land; and (3) the deeds to both The View and MSI incorporate the terms of the Restrictive Covenants. Moreover, the Amended Plat itself refers specifically to the Restrictive Covenants, clearly confirming the relevant intent as to their continuing viability. Each of these points is overlooked in the MSI/Alta response.

1. MSI and Alta Ignore the Plain Language of the Restrictive Covenants.

a. MSI/Alta's Arguments Run Afoul of Utah's Rules for Construing Restrictive Covenants.

The Restrictive Covenants explain the method for effecting their amendment. (Aplt. Addend. Ex. 2, at 50-51 §§ 13.1, 13.2, 13.4; R. 412-13.) Without ever discussing this governing language, MSI and Alta take the position that "the Amended Plat had the purpose and legal effect of amending the CC&Rs." (Aplees. Br. at 16.) They cite no legal authority for the proposition.

This argument runs directly contrary to the plain language of the Restrictive Covenants. The Restrictive Covenants apply by their terms to all amended plats. (Aplt. Addend. Ex. 2, at 5 § 1.19, 6 § 1.25; R. 367, 368.) If merely amending the plats were to amend the Restrictive Covenants, both the Declaration's written amendment requirements and the express language applying the Restrictive Covenants to amended plats would be rendered meaningless. Moreover, no provision in the Restrictive Covenants provides for amendment of the document by merely amending the plat. This Court will not reach strained, nontextual results when construing and harmonizing contractual provisions. *See, e.g.*, *Orlob v. Wasatch Management*, 2001 UT App 287, ¶ 14, 33 P.3d 1078, 1081.

A centerpiece of MSI/Alta's argument is that the Declaration reserved to Sorenson the right to change the location, boundaries, and dimensions of the lots, and that Sorenson in fact did so. This is undisputed. Sorenson amended the plat *but not the Restrictive Covenants governing the plat*. The Restrictive Covenants expressly apply to the plat "as the same may be amended from time to time." (Aplt. Addend. Ex. 2, at 6 § 1.25; R. 368.) *A fortiori*, the restrictive parking covenant remains on Lot 5 (i.e., "New Lot 5").[2] This reflects hornbook law on restrictive covenants.

As for the law, MSI and Alta have all but ignored it. Because the Restrictive Covenants are unambiguous on their face, the Court need only read their plain English.

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[2] MSI and Alta use a "New Lot"/"Old Lot" designation when discussing each aspect of this dispute. These designations are helpful for historical purposes, but they do not change the application of the Restrictive Covenants. As shown in the Appellant's Opening Brief and again here, the Restrictive Covenants apply by their terms to "Lot 5" as reflected on the plat as amended: i.e., "New Lot 5."

See, e.g., *Swenson v. Erickson*, 2000 UT 16, ¶ 11, 998 P.2d 807, 811. MSI/Alta's attempt to go behind this ordinary language runs afoul of basic tenets of Utah contract decisions. *See, e.g.*, *Reed v. Davis County Sch. Dist.*, 892 P.2d 1063, 1065 (Utah App. 1995) (court should not look beyond four corners of contract document if language is unambiguous). Even "where restrictive covenants are susceptible to two or more reasonable interpretations, the intention of the parties . . . is ascertained from the document itself and the language used within the document." *Swenson*, 2000 UT 16, ¶ 11, 998 P.2d at 811. MSI/Alta's reliance on evidence outside the four corners, including contradictory testimony, is simply improper.

MSI/Alta's case law citations, such as they are, serve only to prove The View's points. MSI and Alta cite, for example, *Rowley v. Marrcrest Homeowners' Ass'n*, 656 P.2d 414 (Utah 1982), for the proposition that "[p]lats recorded with condominium declarations are enforceable." (Aplees. Br. at 21.) Actually, the *Rowley* court construed the effect of a plat by *reading the restrictive covenants*. *See* 656 P.2d at 417. Moreover, *Rowley* was a decision reached on findings of fact after a full evidentiary trial. *See id.*

MSI and Alta also misapply key language from *Claremont Property Owners Ass'n, Inc. v. Gilboy*, 542 S.E.2d 324 (N.C. App. 2001), a case that is very much on point. Quoting from that case, MSI and Alta make the remarkable argument that "the Amended Plat [in the instant case] was not 'intended to be subject to the [CC&Rs] already in existence.'" (Aplees. Br. at 21.) In making this argument, they ignore the undisputed facts that (a) the Amended Plat itself references the Restrictive Covenants and notes that the Restrictive Covenants reserve easements "OVER ALL OF THE PROJECT"; (b)

MSI's own conveyances of lots platted in the Amended Plat say they are subject to the Restrictive Covenants; (c) The View's deeds say their conveyances of lots are subject to the Restrictive Covenants; and (d) the Restrictive Covenants themselves say they apply to all amended plats. (R. 233-34, 368-69, 417-18, 420.) MSI/Alta's legal argument utterly fails in light of this undisputed evidence.[3]

To avoid the insuperable difficulties arising from the controlling documents, MSI and Alta suggest "all the circumstances of the transfer must be considered" in determining the underlying intent of the grantor. (Aplees. Br. at 18.) They cite two Utah Supreme Court decisions in support. (*See* Aplees. Br. at 18 (citing *Clotworthy v. Clyde*, 265 P.2d 420 (Utah 1954); *Russell v. Geyser-Marion Gold Mining Co.*, 423 P.2d 487, 490 (Utah 1967)). Their argument ignores three points of law.

First, the cases they cite were both decided after a trial on the merits, not on summary judgment. The cited cases serve merely to highlight the impropriety of granting MSI/Alta summary judgment here.

Second, as already shown in this section, the law of contracts forbids resort to extrinsic evidence unless the language of the instrument is ambiguous, as it was in those cases. The language of the Restrictive Covenants is in no way ambiguous. Here, the language of the Restrictive Covenants and of the deeds of conveyance unambiguously favor The View, requiring summary judgment in The View's favor and making summary judgment against The View inappropriate.

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[3] Nowhere does the Amended Plat so much as suggest it was intended in any way to supercede or otherwise render void the Restrictive Covenants. (R. 420.)

Third, if the Court is to consider "all" the circumstances of the conveyances, it cannot ignore and discount on summary judgment the plain language of the documents evidencing the intent of the parties that the Restrictive Covenants continue to apply to the Amended Plat.

With such evidence apparent in the record, the district court lacked the proper evidentiary basis on which to dispose of this question as a matter of law against The View. In the face of such evidence, especially, MSI and Alta could not properly meet on summary judgment the heightened burden of showing by *clear and convincing evidence* that the Restrictive Covenants were unenforceable. *See Leaver v. Grose*, 563 P.2d 773, 775 (Utah 1977). Indeed, they do not even argue the point, as Utah case law is unequivocal that summary judgment is wrongly granted when such language is present. *See, e.g., Judkins v. Toone*, 492 P.2d 980, 982 (Utah 1972).

In sum, MSI/Alta's arguments consistently run afoul of basic tenets of Utah contract law. By simply applying the law as it should be applied – construing and enforcing unambiguous Restrictive Covenants by their plain terms and correctly applying the summary judgment standard to that construction – the Court should conclude that reversal is required.

b. *MSI and Alta Cannot Establish "Abandonment" or Unenforceability of the Restrictive Covenants as a Matter of Law on this Record.*

Relying on evidence outside the four corners of the governing documents, MSI/Alta next argue that testimony from Walter Plumb evidences the parties' intent to eliminate the easement specifically granted in the Restrictive Covenants. (Aplees. Br. at 22.) However, Utah law is clear that in this context the subjective intent of the grantor is irrelevant if not expressed in controlling language in the governing documents. *See Dansie v. Hi-Country Estates Homeowners Ass'n*, 1999 UT 62, ¶¶ 14-25, 987 P.2d 30, 33-36. If Sorenson had intended the result MSI and Alta argue for now, it could easily have said so at the time in the documents. Because no language to that effect appears in the Restrictive Covenants (let alone in the Amended Plat), and because this evidence contradicts the Restrictive Covenants' unambiguous plain language, the district court erred in relying on such testimony. (R. 590-91; Aplt. Addend. Ex. 1, pp. 3-4.)[4]

Even if the testimony relied on by MSI/Alta in this appeal were admissible, it merely "constitutes evidence" for the trier of fact; it does not form the basis for summary judgment. *See Swenson v. Erickson*, 2000 UT 16, ¶ 21, 998 P.2d 807, 813 (quoted in Aplees. Br. at 22-23). A finder of fact may well reject self-serving testimony that makes no sense and is given in exchange for a release of fraud claims, an evidentiary reality well established in this Court's jurisprudence. *See, e.g., Tucker v. Tucker*, 910 P.2d 1209,

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[4] MSI/Alta point also to similar testimony from Russell Watts, which likewise falls outside and contradicts the import of the governing documents. (Aplees. Br. at 22.) Watts' affidavit was submitted to the district court for the first time with MSI/Alta's final reply memorandum below, giving The View no chance either to respond to it or to take appropriate investigative discovery. (R. 579-81.) The district court properly did not rely on this affidavit in rendering its decision. (R. 590-91; Aplt. Addend. Ex. 1, pp. 3-4.)

1217 (Utah 1996) (trier of fact "entitled to weigh the evidence and reject all or part of any witness's testimony"); (*see also* R. 474, 479, in which The View challenged Walter Plumb's testimony below).

The case law relied on by MSI/Alta also fails to demonstrate that the law entitles them to a judgment. *See* Utah R. Civ. P. 56(c). MSI and Alta rely on *Swenson v. Erickson*, 2000 UT 16, ¶ 21, 998 P.2d 807, 813. (Aplees. Br. at 22-23.) The rule in *Swenson* derives directly from this Court's holding in *Fink v. Miller*, 896 P.2d 649 (Utah App. 1995). *See Swenson*, 2000 UT 16, ¶ 27, 998 P.2d at 814. It focuses on repeated and substantial *violations* of a covenant as the touchstone for abandonment:

- "The case law is uniform that before an abandonment of a covenant may be found there must be 'substantial and general' noncompliance with the covenant." *Id.* ¶ 22, at 813.
- A covenant must be "habitually and substantially violated." *Id.*
- "The violations must be so substantial as to destroy the usefulness of the covenant and support a finding that the covenant has become burdensome." *Id.*
- "If the original purpose of the covenant can still be accomplished and substantial benefit will continue to inure to residents, the covenant will stand." *Id.*
- "Evidence of abandonment must be established by clear and convincing evidence." *Id.*
- Where "the contemplated benefits to the plaintiff still exist," the covenant "has neither ceased nor become useless." *Id.* (emphasis added) (quoting *Papanikolas Bros. Enters. v. Sugarhouse Shopping Center Assocs.*, 535 P.2d 1256, 1261 (Utah 1975)).

No evidence of repeated covenant violations, let alone of a clear and convincing nature, appears in the summary judgment record here. Nothing in the record exists to show the parking covenant has ever been "violated" because Lot 5 has never been developed. Moreover, the contemplated parking benefits to the plaintiff still clearly exist.

The "abandonment" argument is also contradicted by the express terms of the Restrictive Covenants, which provide that "[f]ailure by . . . any Owner or Maintenance Association[] to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter." (Aplt. Addend. Ex. 2, at 29 § 7.1; R. 391.) The conclusion that a party has given up rights in the face of a contradictory express reservation of rights can hardly be sustained on summary judgment against the party reserving its rights. *See, e.g.*, *Living Scriptures, Inc. v. Kudlik*, 890 P.2d 7, 10 (Utah App. 1995) (noting this is a "highly fact-dependent question," especially given existence of express non-waiver provision in contract).

Finally, "[a]bandonment of one covenant does not suggest abandonment of other, albeit similar, covenants in the agreement." *Fink*, 896 P.2d at 655 (citing *Tompkins v. Buttrum Constr. Co.*, 659 P.2d 865, 867 (Nev. 1983) (holding violations of other covenants had no effect on covenant at issue)). Thus, even if other conditions had changed, no abandonment of the parking covenant has been shown to have occurred.

c. MSI and Alta Mischaracterize The View's Arguments.

The View urges enforcement of the plain language of the Restrictive Covenants to property within the Sugarplum development. Contrary to MSI/Alta's argument, this is not a "creeping restrictive covenant" of the type prohibited in *Dansie v. Hi-Country*

Estates Homeowners Ass'n, 987 P.2d 30, 34 (Utah 1999). In *Dansie*, the homeowners association tried to apply restrictive covenants to a landowner *outside* the covered development. The *Dansie* court arguably reached the right decision in holding that such a landowner was not affected by covenants that did not apply to him.

To try to fit within *Dansie*'s holding, however, MSI/Alta argue that the parking covenant does not apply to "the entire Sugarplum development." (Aplees. Br. at 24.) By its own terms, all of the Restrictive Covenants are binding on and enforceable by all the Sugarplum owners and tenants and by their representatives, and in particular by The View on Lot 8 and MSI on Lot 5 because they were referred to in their deeds:

> Any easements or air space rights referred to in this Declaration shall be deemed reserved or granted as applicable, or both reserved and granted, by reference to this Declaration in a deed to any Lot.
>
> This Declaration shall inure to the benefit of and be binding on the successors and assigns of the Declarants, and the heirs, personal representatives, grantees, tenants, successors and assigns of any Owner.
>
> The Master Association, any Maintenance Association or any Owner shall have the right to enforce compliance with the Project Documents in any manner provided by law or in equity . . . .

(Aplt. Addend. Ex. 2, at 49 §§ 12.6, 12.7, 29 §7.1; R. 411, 391.)

MSI/Alta also claim The View's "unfounded assumption" is that "the Lot designated '5' in [the] Amended Plat corresponds in some fashion to the Lot with that number in the [original] Plat." (Aplees. Br. at 27.) This does not fairly characterize The View's position. The View contends rather that Lot 5 of the Amended Plat ("New Lot 5") is governed by the unambiguous Restrictive Covenants. This position is supported by

the governing documents and the controlling law. The district court's refusal to apply that law to the unambiguous Declaration in question was legal error.

MSI and Alta further argue that "Old Lot 5" is the parking area for "New Lot 8" and so The View has gotten what was contemplated originally. (Aplees. Br. at 23.)[5] In making their argument, MSI/Alta suggest that "the exact boundaries of Old Lot 5 were set out in the Plat, which was incorporated by reference in the CC&Rs." (Aplees. Br. at 23.) This rationale, if adopted by the Court, requires reversal: the exact boundaries of "New" Lot 5 were likewise set out in the Amended Plat, which was likewise "incorporated by reference" in the CC&Rs. By the force of MSI/Alta's own reasoning, then, the metes and bounds delineation of "New Lot 5" and its incorporation into the Restrictive Covenants control – especially since the Amended Plat indisputably superceded the original Plat.

Finally, MSI and Alta argue that the terms of the Amended Plat were incorporated in the deed to The View Associates, Ltd. (Aplees. Br. at 19.) So were the Restrictive Covenants. (R. 417-18.) How the Court on summary judgment could properly ignore the terms of the Restrictive Covenants under this scenario is not explained.

2. MSI/Alta Fail to Refute that the Lot 5 Parking Covenant Runs with the Land.

In its Opening Brief, The View showed the Court the Lot 5 parking covenant is a real covenant that runs with the land. (Aplt. Br. at 19-21.) MSI and Alta have not argued to the contrary, nor could they in light of the unequivocal language in the Restrictive

[5] This is less than true: "Old Lot 5" also overlaps "New Lot 9" (which belongs to MSI) and "New Lot 6." (*See* Aplees. Br. at 7-8.)

Covenants. Their failure to respond in any meaningful fashion waives any substantive argument on this point. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 313 (Utah 1998) ("It is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief."); Utah R. App. P. 24(a)(9), 24(b).

Conceding that the parking restriction is a covenant running with the land, MSI and Alta argue only that such covenants may nevertheless become unenforceable. They cite as support this Court's decision in *Fink v. Miller*, 896 P.2d 649 (Utah App. 1995). As already discussed in part II.A.1.b, *supra*, the abandonment rule articulated in *Fink* (and adopted by the Supreme Court in *Swenson*) does not apply here. In *Fink*, this Court affirmed summary judgment declining to enforce a restrictive shingling covenant when 23 of 81 houses in the subdivision had violated the covenant without retributive enforcement. *See id.* at 653-54. The Court held that, as a matter of law, the "violations are so great as to lead the mind of the average [person] to reasonably conclude that the restriction in question has been abandoned." *Id.* at 653 (internal quotations omitted).

In the instant case, in contrast, there have not been repeated violations of the Lot 5 parking restriction. The lot has remained undeveloped until the present. MSI's recent expression of intent to develop it in contravention of the Restrictive Covenants fomented this litigation, litigation that was specifically anticipated in the MSI/Alta agreement. (R. 444.) Such intent to develop was formed only after MSI settled litigation with Alta in which Alta took the position that the very claims MSI advances here were "specious," and then entered into an agreement with Alta to which The View was not a party.

Covenants running with the land generally have an indefinite life. *See, e.g., Thayer v. Thompson*, 677 P.2d 787, 789 (Wash. App. 1984). In this case, the restrictive parking covenant on Lot 5 has a specifically articulated life of 50 years. (R. 412; Aplt. Addend. Ex. 1, p. 50 ¶ 12.12.) The dormancy of the need to invoke the Restrictive Covenants does not affect its enforceability. Thus, it is immaterial that this Covenant "was not asserted for almost 20 years before this case." (Aplees. Br. at 25.) Restrictive Covenants would be useless if, by the mere passage of time, they could not be enforced the first time they were put to the test. The View's need for parking is no less important because of its futurity, and its rights were not threatened until the MSI/Alta development plan was struck in contravention of the Restrictive Covenants. Under these circumstances, the argument that a finding of "abandonment" is appropriate on summary judgment is not well taken.

3. The Restrictive Covenants are Specifically Incorporated by Reference in the Lot 5 and Lot 8 Deeds to MSI and The View.

The deeds to both MSI and The View incorporate by reference the Restrictive Covenants. (R. 234, 417-18.) Nevertheless, MSI/Alta fail even to discuss the governing Utah case law holding that summary judgment against The View is therefore inappropriate.

Instead, they argue that because the deed to The View's predecessor incorporated both the Plat and the Amended Plat in its legal description these descriptions must be harmonized to discern the grantor's intent. They conclude that the Amended Plat must be viewed as superseding the Plat, "thereby amending the CC&Rs." (Aplees. Br. at 19.)

The View agrees the Amended Plat superseded the original Plat; but it does not follow that the Restrictive Covenants were thereby amended. MSI and Alta repeat this erroneous *non sequitur* numerous times in their briefing without supporting record or legal citations. This Court should reject it for the incorrect statement of law it is.

Were the Court to agree with MSI/Alta's argument that the parking right remains attached only to "Old Lot 5," then the district court's decision still requires reversal. "Old Lot 5"comprises portions of "New Lots 6 and 9" as well as part of "New Lot 8." (*See* Aplees. Br. at 7-8.) Neither MSI nor Alta has suggested a reason why only that part of "Old Lot 5" lying on "New Lot 8" would be restricted. Their own analysis would require a different outcome than the district court's.

In sum, The View's meritorious arguments remain untouched by anything advanced in this appeal by MSI or Alta. The plain language of the documents, the legal effect of a covenant running with the land, and the undisputed incorporation of the Restrictive Covenants into the deeds demand reversal of the district court's summary judgment decisions. Judgment as a matter of law should be granted The View based on the unambiguous controlling language of the governing documents.[6]

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[6] MSI/Alta's harsh rhetoric about what The View "failed to tell the District Court," what The View's "real aim" is, what The View's "absurd" argument is, along with similar disparaging remarks made throughout their briefing, is unhelpful and, in truth, has no place in reasoned appellate review. (Aplees. Br. at 27-28, *passim*.)

B. MSI/Alta's Factual Argument Highlights the Impropriety of Granting Summary Judgment in their Favor.

Reduced to its essence, MSI/Alta's argument reveals itself as a series of factual contentions. Relying on selected record citations while ignoring others, MSI and Alta argue what Sorenson's "intent" was in amending the plat and transferring title to the deeds. Standing squarely in contradiction to their arguments are (1) the plain language of the Restrictive Covenants; (2) the unrefuted evidence the Restrictive Covenants were to run with the land; (3) the language of the deeds ; and (4) the language of the Amended Plat itself.

MSI and Alta argue the evidence as if this were the closing of trial. But this Court is not to weigh the evidence on summary judgment nor resolve disputes in the record. MSI and Alta have not shown the evidence they argue is undisputed – it is not. In fact, the material evidentiary disputes pointed out in The View's Opening Brief, which stand in the way of summary judgment for MSI/Alta, have not even been addressed.

If this Court does not peremptorily enter summary judgment for The View based on the enforcement of the unambiguous language of the governing documents, it is compelled by the state of the record to reverse and demand for a resolution of these fact conflicts.

III. MSI/ALTA MAKE A PURELY FACTUAL ARGUMENT ON THE LOT 9 RECORD.

MSI/Alta's discussion of The View's Lot 9 legal claims is also peppered with factual argument, including argument based on disputed facts. MSI and Alta do not respond to The View's showing of disputed material facts. (Aplt. Br. at 27-28.) The

Court views all such facts in the light most favorable to The View. *See Beehive Brick Co. v. Robinson Brick Co.*, 780 P.2d 827, 831 (Utah App. 1989). Doing so demonstrates the impropriety of granting summary judgment for MSI/Alta on this record.[7]

Estoppel: Alta recognizes that estoppel may arise by acts, representations, admissions, or silence which intentionally or negligently induce another to believe certain facts exist. (Aplees. Br. at 34.) There is ample such evidence that, for 15 years, Alta considered and represented Lot 9 as designated for snow storage for The View, and as such would not allow development of Lot 9 by MSI. This evidence has been carefully catalogued in The View's Opening Brief and includes Alta's position in litigation against MSI that MSI's contrary argument was "specious." (Aplt. Br. at 27-28.)

Alta also argues that no record evidence exists of reliance by The View. (Aplees. Br. at 33, 35.) To the contrary, The View submitted an affidavit from William T. Levitt, a long-term resident of the Town of Alta, an owner of a condominium unit in The View, and The View's Association President for many years. (R. 523.) He averred that since construction of The View condominium building in 1985, The View had used Lot 9 to store snow during the winter months and that at no time had the owner of Lot 9 objected to the use of Lot 9 for snow storage. (R. 523.) Moreover, correspondence from Alta's own counsel to The View acknowledges both The View's reliance and the importance of this reliance. (R. 541-42.)

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[7] Because of MSI/Alta's failure to discuss the evidence, The View does not repeat all such evidence here, as it was set out in full in The View's Opening Brief. (Br. of Aplt. at 27-28.) Rather, The View focuses its argument on the principal legal issues raised by MSI, addressing them in the order it addressed them in its Opening Brief. (Br. of Aplt. at 29-31.)

Notably, estoppel is asserted not only against Alta, but also against MSI. Nevertheless, MSI fails even to brief the issue, waiving any argument it may have.

Easement: The thrust of the district court's decision was that no dedication or easement had been "recorded." (Aplt. Addend. Ex. 1, at 4; R. 591.) The View has shown that recordation is not a prerequisite to land use dedication when a party has actual notice. (Aplt. Br. at 30.) The record evidence shows Alta and MSI had actual notice of the use of Lot 9 for snow storage, which was insisted on by Alta over MSI's protestations. The district court's decision therefore should be reversed.

Taking: MSI and Alta argue that The View's expectation of a continued right to snow storage on Lot 9 was "unilateral." (Aplees. Br. at 37.) To make this statement, they ignore all the record evidence in which Alta seconded The View's position.

MSI/Alta also make the bald assertion there is "no evidence" that The View's interest would be abridged to any substantial degree by any action on the part of Alta. They wholly ignore the evidence set out in The View's Opening Brief discussing *Alta's own correspondence* threatening The View with an injunction prohibiting possession and use of its property. (R. 541-42.)

Contract: Alta argues it would be "absurd" to suggest that Alta would govern land use decisions by contract, as such a result "extinguishes the police power on which all Utah municipalities rely to establish and enforce ordinances or regulation governing land use." (Aplees. Br. at 31.) However, this is precisely the underlying basis for Alta's development decisions with MSI. (R. 437-48.) Those parties entered into a *contract* purporting specifically to govern land use, including, among other things, "**Snow**

Removal and Storage Requirements." (R. 437-48.) "Absurd" as this may seem, the Alta/MSI relationship is now governed at least in part by contract – not necessarily to the exclusion of police power, but at the very least, as an independent enforceable right.

Alta makes a selective factual argument focusing primarily on a statement made by Alta Town Administrator John Guldner. (Aplees. Br. at 32.) Alta highlights portions of his statement and downplays other parts. Alta simultaneously ignores other similar statements that are more concrete. Summary judgment on such a selective review of the record is insupportable.[8]

Lastly, Alta points again to the Russell Watts affidavit stating that he understood the snow storage area on Lot 9 was temporary. (Aplees. Br. at 33.) This affidavit was submitted by Alta in its reply memorandum below and was properly not relied upon by the district court. *See supra* note 4. Moreover, the subjective understanding of Mr. Watts is subject to cross-examination, does not square with the facts that have developed in the intervening 18 years, and is contradicted by other evidence.

In sum, the factual disputes permeating the Lot 9 issue require reversal and remand for further evidentiary proceedings. It was legal error for the district court to enter summary judgment given this record.

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[8] Alta also makes the immaterial argument that "the ministerial acts of municipal employees are not binding." (Aplees. Br. at 32 n.12.) This argument should be rejected because (a) this is not a ministerial act, and (b) regardless whether his statements are binding, they constitute evidence of the understanding of the Town of Alta, which a fact finder could consider in the overall mix of evidence.

CONCLUSION

The district court's erroneous decision should be reversed. Judgment should be granted to The View as a matter of law with respect to the Lot 5 parking covenant, based on the unequivocal, unambiguous language of the Restrictive Covenants. Alternatively, the language of the controlling documents creates, at the very least, a factual dispute that cannot be resolved against The View on summary judgment, but requires submission to a finder of fact. Finally, the issues regarding Lot 9 are inherently factual and are vigorously disputed. Summary judgment on this record was inappropriate. This Court should reverse the district court's decisions, remand as needed, and assure that the law of restrictive covenants is not ignored in the Utah courts.[9]

DATED this _____ day of January, 2004.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By: _____
Robert E. Mansfield
Stephen K. Christiansen
Attorneys for Appellant The View Condominium Owners Association

[9] MSI/Alta's request for costs on appeal is spurious and should be rejected, with appeal costs awarded to The View.

CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing REPLY BRIEF OF APPELLANT to be mailed, postage prepaid, this _____ day of January, 2004, to the following counsel of record:

William H. Christensen
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